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IN THE

Supreme Court of the United States

October Term, 1941.

No. 169

RICHARD W. LECHE,

Petitioner,

versus

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

PETITIONER'S REPLY BRIEF.

MARTIN W. LITTLETON, JR.,
Attorney for Petitioner.

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ADDITIONAL REASON FOR GRANTING WRIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Since the filing of the present petition and on June 12, 1941, the Circuit Court of Appeals for the Fifth Circuit, composed of Circuit Judges Foster, Sibley and Hutcheson, in *Stapp v. United States* (unreported), rendered a de-

cision in absolute conflict with the decision of that court, composed of Circuit Judges Sibley, Holmes and McCord in the instant case. As the *Stapp* case is unreported, we ask leave to quote rather extensively from its opinion by Foster, Circuit Judge.

> "The material facts may be briefly stated. There is no doubt defendants entered into a scheme to defraud Christian by falsely inducing him to believe that defendant Stapp was an agent of the Gulf Oil Corporation, authorized to buy an oil lease for that company from defendant Rudder for the price of $8000 and that Stapp could buy the lease for $4800. The proposal was made and accepted by Christian that he buy it from Rudder and in turn Stapp would buy it from him, for his principal, for $8000, the profit of $3200 to be divided between Christian and Stapp. The transaction was consummated at Pauls Valley National Bank, Pauls Valley, Oklahoma. Christian went there, taking with him a letter of credit issued by the Citizens Bank of Tyler, Texas, in the sum of $5000. He bought the lease, which subsequently proved to be valueless, and drew a check in favor of the Pauls Valley Bank on the Tyler bank, in the sum of $4800, for which the Pauls Valley bank issued its cashier's check to Rudder in payment for the lease. Rudder accepted the cashier's check, payable to himself, and the next day cashed that check with the Pauls Valley bank and received the money. Christian's check on the Tyler Bank and the letter of credit were then sent by the Pauls Valley bank by railway express to its correspondent, Liberty National Bank at Oklahoma City, Okla., which bank forwarded it to Fort Worth National Bank of Fort Worth, Texas, for collection. The Fort Worth bank, in the regular course of its business, mailed Christian's check and

letter of credit, with an accompanying collection letter, to the Tyler bank. The mailing of this letter by the Fort Worth Bank at Fort Worth, Texas, is the basis of the indictment."

The court upon these facts held:

"In this case it is apparent the purpose of the scheme to defraud Christian had been completely accomplished when the Pauls Valley Bank accepted his check on the Tyler bank and the money was paid to Rudder. Christian was then and there defrauded. Up to that point the mails had not been used at all. Christian could not have legally done anything to stop payment of his check and was obligated to reimburse the Pauls Valley Bank for cashing it. While the mails were incidentally used, the defendants had no interest whatever in that transaction. None of the banks involved, was their agent, innocent or otherwise. The mailing of the letter from Fort Worth to Tyler was not in furtherance of the scheme and was not 'caused' by them. The facts do not support the conviction. Spillers vs. U. S., 47 F. (2d) 893. Cf. Hart vs. U. S., supra."

The facts relating to the use of the mails made the basis of the indictment in the *Stapp* case are on all fours with the facts relating to the use of the mails made the basis of the second and third counts of the indictment against petitioner.

On September 15, 1938, the Younger Motor Truck Co. billed the Louisiana Highway Commission for $170,158.51 for 95 motor trucks delivered in the fall of 1938 (Ex. G-27, R. 883). On September 16, 1938, the Louisiana Highway

Commission issued its warrant due December 31, 1938, for $170,158.51 to the Younger Motor Truck Corporation in payment of said trucks (Ex. G-30, R. 953). On September 17, 1938, the Younger Motor Truck Co. sold the warrant to Newman, Harris & Co., receiving in payment therefor Newman, Harris & Co.'s check for $170,158.51 (Ex. G-32, R. 957). On September 19, 1938, Younger Motor Truck Company deposited Newman, Harris & Co.'s check with the Guaranty Bank and Trust Company of Alexandria, and on the same date the Guaranty Bank and Trust Company credited Younger Motor Truck Co.'s account with the amount of this check (Ex. G-37, R. 963). On September 17, 1938, the Younger Motor Truck Co. issued to James Thomas its draft drawn on the Guaranty Bank and Trust Co. for $22,000.00. This draft bore the notation "Commission on trucks" and represented payment of a commission on the sale of the 95 trucks (Ex. G-43, R. 971). All alleged payments by Thomas to petitioner were made prior to Thomas' receipt of this draft (R. 701). On September 17, 1938, Thomas unrestrictedly endorsed said draft and deposited it in the City National Bank at Baton Rouge, and on the same date the City National Bank credited Thomas' account with $22,000.00 (Ex. G-45, R. 973). The ledger sheet of the City National Bank of Baton Rouge under date of September 17, 1938, shows the credit to Thomas' account of this $22,000.00 and a charge on the same date of $10,020.03, $2,410.36, and $3.00, and that the account without the deposit of the $22,000.00 would have been insufficient to meet these charges (R. 973). The City National Bank of Baton Rouge thereupon forwarded this draft, with other checks, in a cash letter to the Commercial National Bank in Shreveport (R. 272-273,

Ex. G-66, R. 1005). The Commercial Bank in turn forwarded this draft, with other checks, in a cash letter to the Rapides Bank and Trust Company in Alexandria (R. 327-329, 335-336, 341). The Rapides Bank and Trust Company sent it by special messenger to the Guaranty Bank and Trust Company where it was cleared (R. 336). The delivery of the draft to the Rapides Bank and Trust Company is the basis of the charge in the second count of the indictment, that the defendants on September 20, 1938, knowingly caused the draft to be delivered by mail according to the directions thereon.

The undisputed evidence shows that the warrant of the Louisiana Highway Commission for $170,158.51 alleged to have been obtained by Younger Motor Truck Company in pursuance of a scheme to defraud was sold on September 17, 1938, by the Younger Motor Truck Company to Newman, Harris & Co. for $170,158.51. The liability of the Louisiana Highway Commission on the warrant was established and fixed the moment the warrant was sold to and purchased by Newman, Harris & Co. for its face amount.[1] The Louisiana Highway Commission was "then and there defrauded". It could not legally do anything to stop payment of its warrant and was obligated to reimburse Newman, Harris & Co. on its purchase. *Stapp v. United States, supra.* The purpose of the alleged scheme to defraud the Louisiana Highway Commission was com-

[1] It is elementary that the drawer of a check has no legal right to revoke his check, that is, stop payment after the instrument has passed into the hands of a bona fide holder for value. Universal Supply Co. v. Hildreth, 287 Mass. 538; Carhort v. Second National Bank, 98 N. J. L. 373; Gage Hotel Co. v. Union National Bank, 171 Ill. 551. Fraud relating to the consideration for which a check is given is never a defense in an action thereon by a bona fide holder for value in due course. Bridgeport Nat. Bank v. Blackman, 249 N. Y. 322.

pletely accomplished upon the receipt by Younger Motor Truck Company of $170,158.51 from Newman, Harris & Co. Up to that point the mails made the basis of the second and third counts had not been used. As it is vital to the commission of the offense that the letter be in furtherance of the scheme, use of the mails after the purpose of the scheme had been completely accomplished clearly could not be for the purpose of executing the scheme within the intent and meaning of Sec. 215.[2]

Moreover, the incidental use of the mails by the Commercial National Bank of Shreveport in forwarding the $22,000.00 draft to the Rapides Bank and Trust Company of Alexandria was not "caused" by the defendants. The legal effect of the City National Bank crediting Thomas' account with $22,000.00, the amount of the draft, was the ordinary transfer or sale of the draft by Thomas and the purchase of it by the City National Bank, and upon its delivery title to the draft passed and the City National Bank became the owner. *Burton v. United States*, 196 U. S. 283; *City of Douglas v. Federal Reserve Bank*, 271 U. S. 489; *Daykin v. Bayly*, 290 U. S. 143.

"It (City National Bank) was in no sense the agent of the defendant (Thomas) for the purpose of collecting the amount of the check from the trust company upon which it was drawn". *Burton v. United States, supra.* "The bank (City National Bank) would collect the item not as

[2] Stapp v. United States (supra); Mitchell v. United States, 118 F. (2d) 653; McNear v. United States, 65 F. (2d) 861; Dyhre v. Hudspeth, 106 F. (2d) 286; Armstrong v. United States, 65 F. (2d) 853; Little v. United States, 73 F. (2d) 861; Stewart v. United States, 119 Fed. 89; Merrill v. United States, 95 F. (2d) 669.

agent for the depositor (Thomas), but as owner." *Daykin v. Bayly, supra.* As none of the banks was the agent, "innocent or otherwise", of Thomas or the defendants, the incidental use of the mails by the banks was not "caused" by the defendants. *Stapp v. U. S., supra.* It is clear that the use of the mails made the basis of the second count was not in furtherance of the scheme to defraud charged to have been devised by the defendants and not "caused" by them. Furthermore, it must be remembered that the evidence establishes (R. 401-402-417, 701) that the last alleged payment by Thomas to petitioner was made "about a week or ten days after" Sept. 1, 1938. Therefore the collection of the $22,000.00 draft could in nowise be connected with the distribution of any funds to petitioner. The facts of the present case under the authority of *Stapp v. United States,* do not support the conviction.

The *Stapp* case and the present case present such a clear conflict in decisions rendered by the same circuit court composed of different judges within such a short space of time as to require the exercise of this Court's supervisory jurisdiction.

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES.

I.

1. Government counsel argue (Brief 8-10) that the allegation in the indictment that it was a further part of the scheme that the defendants would fail and refuse

to comply with a penal statute of the state requiring competitive bids before purchasing the trucks, was in no sense "an essential element of" but "merely an incidental step in" the scheme alleged, because "in essence the crime charged was that, in violation of his official trust as Governor, petitioner derived a secret profit from his fiduciary relationship, and that such a scheme, "whether effectuated by failure to invite bids or otherwise", falls within the well-recognized category of frauds governed by the Mail Fraud Statute.

The short answer to this contention is that the indictment does not charge petitioner with violating "his official trust as Governor", or the defendants or any of them with deriving a secret profit from their "fiduciary relationship" or how "otherwise" than "by failure to invite bids" the scheme was to be effectuated. It is significant that in this connection government counsel fail to point out to this court wherein the indictment so charges. As a matter of fact the trucks in question were bought by the Louisiana Highway Commission, an independent corporation, of which petitioner was not even *ex officio* a member, nor chargeable with any duties in relation thereto.

The averment that the defendants failed and refused to comply with the state law requiring competitive bids and contracts is the sole averment contained in the indictment charging the defendants or any of them with violating any duty or trust in purchasing the trucks and the sole averment of fraud therein contained. Eliminating this allegation, the indictment is fatally defective (Pet. 15-18).

Moreover, the indictment from the time of its filing to the charge of the court was tried by the court, government and petitioner upon the theory that the state statute required the defendants to advertise for bids before purchasing the trucks and that defendants' failure and refusal to comply with this statute constituted the basis of the scheme to defraud therein charged. (Pet. 11.) It was only after it was conclusively established by the government's own witnesses that the trucks in question were purchased just as trucks had always been purchased by the Louisiana Highway Commission and in accord with its established custom, that the court, at the request of the government, instructed the jury to disregard the allegation in question as surplusage. The trial court clearly struck out a material part of the indictment, destroyed the entire pleading and ousted its jurisdiction, violating petitioner's rights under the Fifth Amendment to the Constitution of the United States. (*Ex Parte Bain,* 121 U. S. 1; *Thornhill vs. Alabama,* 310 U. S. 87, 96.)

2. Government counsel, in answer to petitioner's contention that the trial court by withdrawing the two and only two false representations set forth in the indictment, struck out a material part of the indictment, namely, the means of carrying out the fraud, and thus destroyed the indictment, argue (Brief 10-11) that petitioner "relies upon the supposed fact that this indictment was built upon the misrepresentations in question", but that "it is clear that the misrepresentations were but a minor incident in the perpetration of the principal fraud alleged here". This is a novel argument, almost, if not a complete confession of error. To argue that the two and only two false repre-

sentations set forth in an indictment are "but a minor incident" and that the trial court may instruct the jury to disregard them as surplusage would seem to indicate that the government is willing to cast aside all fundamental and basic law to sustain petitioner's conviction, for as stated by this Court, "And when the pretenses or representations or promises which execute the deception and fraud are false, they become the scheme or artifice which the statute denounces." *United States v. New South Farm & Home Co.*, 241 U. S. 64, 71. Moreover, it is settled law that to sustain an indictment charging a scheme to defraud by means of false representations, at least one of the false representations therein alleged must be proven (Pet. 19). That the present indictment charges a scheme to defraud by means of false representations (R. 2, 7-8), and that the withdrawal from the indictment of the two and only two misrepresentations charged destroyed the entire pleading, cannot be questioned.

Government counsel further argue (Brief 10-11) that "the trial court did not withdraw the allegations as to misrepresentations". The indictment in charging the false representations (R. 7-8) states what the representations were, alleges that the defendants knew them to be false and then alleges why they were false. A mere reading of the representations makes it clear that the grand jury based its finding that the representations were false upon its finding that the defendants failed and refused to comply with the law requiring competitive bids and contracts. Government counsel do not question this fact but contend that the averment alleging why the representations were false "is only by way of explanation", and, therefore, may

be withdrawn as surplusage without destroying the indictment. The answer to that contention is that the indictment must set forth the representations with proper averments and sufficiently negative their truth. "The averments must state what was pretended; and that what was pretended was false, and wherein and in what particular it was false."[3] The averment as to the falsity of the representations is not "by way of explanation" but a necessary negation of the truth of the representations. It is clear that the two and only two false representations charged were withdrawn from the indictment, when the trial court by its instructions withdrew the statute upon which they were based.

3. Government counsel argue (Brief 11-12) that petitioner "further asserts that the elimination of the Louisiana bidding statute from the case leaves his conviction resting solely upon his failure to exercise 'discretion' or 'business prudence', relying in this connection upon isolated extracts from the opinion of the Circuit Court of Appeals and the trial court's charge to the jury". The short answer to this contention is that petitioner does not rely upon "isolated extracts" but upon the trial court's charge to the jury, when it instructed them "to put that statute aside", and "not to consider it here", at which time it said:

> "Regardless of that (the statute), there still remains the duty upon everyone connected with the matter to exercise discretion." (R. 767.)

[3] United States v. Watkins, 28 Fed. Cas. 419; Haas v. United States, 93 F. (2d) 427; United States v. New South Farm and Home Company, 241 U. S. 64, 68, 71.

Upon review, the Circuit Court of Appeals found:

> "The district court instructed the jury that it was doubtful whether the state law required the defendants to advertise for bids, and to disregard that question, since, without the statute, there still remained the duty to exercise business prudence. We think the court committed no error in this respect, because the averment as to the requirement under the state law was wholly immaterial and unnecessary."

The above quotation is not an "isolated extract" but everything that the opinion of the Court of Appeals sets forth with reference to the point in question, and the language used shows clearly and affirmatively that the Appellate Court merely substituted its "Business Prudence" for the trial court's "Discretion".

It is evident that the Circuit Court of Appeals approved the action of the trial court in instructing the jury to disregard the question whether the state law required the defendants to advertise for bids solely upon the ground that "without the statute there still remained the duty to exercise business prudence".

Government counsel then state that petitioner "argues that there can be no scheme to defraud without deceit (Pet. 12-15)". It cannot be that counsel question such a fundamental principle. Of course there can be no "scheme to defraud" without "fraud", and as there can be no "fraud" without "deceit", it naturally follows that there can be no "scheme to defraud" without "deceit".

Government counsel then state that "the short answer to petitioner's contention is that his conviction did not

rest upon any innocent failure to exercise business prudence". Government counsel thus concede that petitioner's conviction rests upon some form of "failure to exercise business prudence" but not upon "any innocent failure to exercise business prudence". It would seem that government counsel are unable even at this time to point out to this Court the specific charge upon which petitioner's conviction rests. We appreciate their difficulty. The trial court's charge left each juror free to frame his own scheme, to choose his own means, and to find petitioner guilty for any rhyme or reason without regard to the indictment found by the grand jury.

Where the prosecution obtains an indictment which charges the violation of a specific penal statute, and afterwards, on the trial of the defendant under said indictment, the prosecution requests the court to charge, and the court so charges, that the alleged violation of said statute is surplusage, a conviction so obtained cannot stand.

This would open the door to the prosecution for the use of a penal statute simply as a means of inducing a grand jury to return an indictment, and then, later, on the trial of the defendant under the indictment so obtained, abandoning the alleged violation of the statute as being of no further use.

No court can permit the opening of such a door. Other things may be surplusages but specific penal laws, specifically charged in an indictment, can never be surplusage. The reason for this is obvious. No better example could be found than the instant case.

Petitioner was Governor of the State. He had taken an oath to uphold the laws of the State. This is a matter of common knowledge. It might well have been the alleged violation of the state statute requiring bids, one of the very laws petitioner had taken the oath to uphold, which induced a grand jury, composed of laymen, to return this indictment. Had the grand jurors been advised "But in any event you may put that statute aside. You are not to consider it here", (R. 767), and, "You should disregard that as surplusage", (R. 780), there may probably have been no indictment in the first place. The alleged violation of the statute having served its purpose, cannot, in the closing moments of the trial, be cast aside as surplusage, and petitioner tried on a charge not made without violating his rights under the Fifth Amendment to the Constitution.

It is clear that petition, indicated for using the mails in furtherance of a scheme to defraud, was tried upon and convicted of a charge other than that alleged in the indictment, namely, failure to exercise "discretion", and that the Circuit Court of Appeals, to affirm the judgment of conviction, was forced to hold that failure to exercise "business prudence"—"discretion" re-edited—constituted a scheme to defraud within the purview of the Mail Fraud Statute.

It is respectfully submitted that the government's brief utterly fails to answer the questions raised with regard to the violation of petitioner's constitutional rights (Pet. 11-20) resulting from the destruction of the indictment as found by the grand jury and his trial on a "charge not made".

II.

The Government's brief (Brief 16-17), concerning the plea of duplicity, states, "In the instant case, the evidence fully supported the theory of the indictment that there was a single integrated scheme to defraud". The evidence is directly to the contrary. Government witness Thomas, the only witness who testified as to the alleged second meeting a year later relative to the second purchase of trucks (R. 412-413) said:

> "Q. That was a separate new transaction?
> "A. Yes.
> "Q. And had no connection with the previous transaction of 138 trucks, did it?
> "A. No.
> "Q. It was separate and distinct?
> "A. That's right."

What could be more positive than this testimony? The Government (Brief 17) relies solely on the statement by Thomas (R. 467) that when he gave Younger the 1938 order he told him "to just furnish so many trucks the same as previously". This is a stock phrase in business circles. "Same as previously" is often used in ordering goods from a concern that has furnished them in the past. It had nothing to do with the transaction other than to specify the type of equipment.

But when Thomas was asked the direct question "And had no connection with the previous transaction of 138 trucks, did it?", his answer was "No". This evidence certainly does not "fully support the theory of the indictment".

When Thomas was asked (R. 413) relative to the second meeting, a year later, "What was discussed then at that meeting?", he answered "Additional equipment needed by the Maintenance Department". This testimony does not show any "single integrated scheme to defraud". It shows the contrary.

A most significant occurrence, with respect to the evidence of duplicity, is the testimony of Abernathy. Abernathy (Pet. 34-35), although an alleged accomplice with (R. 687-688) the expectation of leniency, was not used by the Government on its direct case but was called by the Government in rebuttal. Thomas preceded Abernathy on the witness stand and had testified positively (R 412-413) that the two purchases of trucks, a year apart, were separate and distinct transactions with no connection between them. Yet the Government did not ask Abernathy one single solitary question about the second transaction in 1938, although he was in a position to so testify and to tell whether or not it was in any way connected with the 1937 purchase of trucks. But this is not all. When petitioner's counsel attempted to question Abernathy as to the second transaction in 1938, Government Counsel (R. 682) objected "for the reason that he was not questioned about the 1938 deal. He is restricted to the direct meeting in 1937 in August", and was sustained (R. 682) by the Court. Thus the Government not only failed to attempt to prove by its own witness "the theory of the indictment that there was a single integrated scheme to defraud", but actually, by objection sustained by the Court, prevented petitioner from cross examining him on this point. And this in view of the previous posi-

tive testimony (R. 412-413) of Thomas that there was no connection between the two transactions, and in further view of the fact that Abernathy was improperly (Pet. 34-35) called in rebuttal. The evidence of duplicity, out of the mouths of the Government's own witnesses, is undeniable.

III.

The brief for the United States submitted herein utterly fails to answer any of the points raised in the petition for writ of certiorari. Government counsel, however, contend that petitioner's contention that he did not receive a fair and impartial trial because of misconduct of the prosecutor should not be considered by this Court, because "the evidence of guilt is strong and convincing".

In submitting his petition to this Court, petitioner purposely omitted all discussion of evidence except as to the use of the mails made the basis of the different counts of the indictment. This was done for two reasons: (1) the questions raised were purely questions of law, and (2) the trial court's action in striking out the scheme actually alleged and in submitting the case to the jury on "a charge not made" rendered any proper or orderly discussion of the evidence, that is, with respect to the offense actually alleged, impossible. However, the brief of the government devotes almost its entire "Statement" to its summary of the evidence (Brief 4-8). Government counsel contend that "in essence the crime charged was that, in violation of his official trust as Governor, petitioner, in connivance with Abernathy, the Chairman of the State Highway Commission, and Younger, a motor truck dealer, caused

the Commission to buy a large number of trucks at excessive prices for the purpose of deriving an exorbitant profit which would be covertly shared by Younger, the dealer, petitioner, and his alleged intermediary, Thomas, that this scheme "was abundantly proved" (Brief 9) and that "the evidence of guilt is strong and convincing".

Even accepting the government's version of the crime charged, although the indictment as hereinbefore pointed out fails to support this version, an examination of the record establishes that it is barren of any substantial evidence showing any participation by petitioner in this or any other scheme to defraud the Louisiana Highway Commission in the purchase of the trucks in question or any knowledge on his part that any such scheme existed between other persons.

According to the government there were four participants to the alleged scheme, petitioner, Abernathy, Younger, and Thomas (not indicted). At the opening of the trial Abernathy and Younger withdrew their pleas of not guilty and entered pleas of guilty, imposition of sentence being deferred until after petitioner's trial. It is thus evident that the case of the government did not depend upon circumstantial evidence or present difficulty of proof. The government had it within its power to prove by direct evidence, that is, by the testimony of Abernathy, Younger and Thomas, concededly parties to the alleged schemes, petitioner's participation in any scheme to defraud that may have existed. Yet Thomas alone was called on its direct case, Abernathy only in rebuttal, and then the government by objection (R. 682)

limited his cross examination to matters covered on direct examination. Younger was not even put on the witness stand. In *Crawford vs. U. S.*, 212 U. S. 183, where the defendant was similarly situated, this Court said "The defendant was peculiarly situated in this case, and great care was necessary to prevent injustice to him." Such care was totally lacking in the instant case.

An examination of the record fails to disclose a scintilla of evidence showing petitioner's violation of any official trust as Governor. As a matter of fact petitioner as Governor was not chargeable with any duty or trust in purchasing the trucks. The trucks were bought by the Louisiana Highway Commission, an independent corporation, of which petitioner, as Governor, was not even *ex-officio* a member. Moreover there is not a scintilla of evidence in the record showing any connivance between petitioner, Abernathy, or Younger, in the purchase of the trucks. Abernathy, called as a witness in rebuttal and available to the government on its direct case, could have testified to the existence of any such connivance but gave no such testimony. Younger and Thomas could have done the same but Younger was not called and Thomas, as the government's principal witness, testified to the contrary, he said (R. 485) "I have never thought there was anything wrong in this truck deal".

Moreover, witnesses called by the government established that the trucks in question were purchased just as trucks had always been purchased by the Louisiana Highway Commission (R. 157, 158, 159, 168, 246, 257, 260) for a period of over 10 years and that such purchases

were in accord with the established custom of the Highway Commission. In addition thereto the trial court instructed the jury (R. 767, 779, 780) that the purchase of the trucks in question violated no state law. Therefore neither custom or law was violated.

The record further shows (R. 466) that the prices paid for the trucks were obtained by Abernathy from the International Harvester Company.

The record further shows that petitioner did not recommend (R. 398, 686) the make or number of trucks to be bought; that he knew nothing (R. 411) about truck prices; that he never at any time (R. 411, 413, 414) discussed prices or terms of sale with either Thomas or Abernathy, and that he did not even know (R. 615, 647, 674) Younger.

Although government contend that the trucks in question were sold pursuant to the scheme at excessive prices to the Louisiana Highway Commission, it is significant that neither Thomas nor Abernathy were asked a single solitary question in reference to any such agreement between any of the alleged participants to the scheme, and of course, Younger was not even called. It is further significant that Abernathy was not even asked about the price paid for the trucks, although Thomas (R. 466) had previously testified that when Abernathy gave him the prices Abernathy had told him that he had obtained them from a representative of the International Harvester Company.

The schemes charged are alleged to have been confected at two meetings between Abernathy, Thomas and

petitioner held in 1937 and in 1938. Yet the testimony of government witnesses, Abernathy and Thomas, is utterly barren of any evidence in any way connecting petitioner with any fraudulent scheme. Thomas testified (R. 398) that at the first meeting there was a general discussion of the kind of equipment to be used and that Abernathy had a list of the equipment requested by his men and that petitioner told Abernathy to buy what he, Abernathy, recommended and where to place the business. He also testified (R. 411) that no prices or terms of sale were discussed and that petitioner knew nothing about truck prices. Abernathy testified (R. 686) that he recommended Internationals, and that all that was discussed (R. 685) at the meeting was the quantity to be bought and where to place the business. He said (R. 673) that the Governor had instructed him to make no purchases until he had conferred with him and instructed him what do do, but petitioner (R. 655) emphatically denied this. It is further significant that petitioner (R. 615, 647) had never heard of Younger, that Abernathy (R. 674) admitted that petitioner did not know Younger but that Younger was an International dealer and that Abernathy (R. 686) recommended International trucks.

As to the second meeting in 1938, Thomas (R. 413, 414) testified that the only thing discussed was additional equipment needed by the Commission and that petitioner did not discuss prices and did not know what was going to be paid for the trucks. As the prices paid for the trucks are the crux of the matter this direct and uncontradicted testimony by the government's principal witness that petitioner did not know what price the Highway Commis-

sion was going to pay for them clearly entitled petitioner to a directed verdict. Further than this, although Abernathy was improperly called in rebuttal, he was not examined on direct as to the second meeting in 1938 and his cross examination (R. 682) on this important matter was curtailed by objections sustained by the Court. Thomas testified (R. 485) that he "never thought there was anything wrong in this truck deal", and he further testified (R. 485) that he thought "Abernathy used reasonable precaution to buy trucks at the right price".

Thus, although it had within its power to prove by the direct evidence of the parties themselves the alleged fraudulent scheme, the Government failed completely to prove its case. Petitioner (R. 614) denied both the above meetings. However, if both of said meetings had been held and had there taken place at said meetings just what Abernathy and Thomas testified to, nothing is proved beyond what takes place every day between any Governor and his various department heads, namely, a discussion of the needs of the department and the recommendation and suggestion of those interested in its welfare.

The statement of Thomas that he paid petitioner the sum of $31,000.00 stands absolutely alone, being uncorroborated and unconfirmed by the testimony of any other witness, any document or any circumstance and, in addition to this, is rendered most improbable by Thomas' own testimony and certain inescapable facts contained in the record, besides the positive and unequivocable denial of petitioner (R. 613, 614).

The two commissions received by Thomas in 1937 and a year later in 1938, were lumped together by the Government and this "$53,000" was referred to continually by Government counsel throughout the testimony of Thomas (R. 374-499). The reason for this is obvious.

In the first place, Thomas testified (R. 401) that the payment of $31,000 to petitioner was made in three payments, the sum of $12,000 being paid to petitioner on September 1, 1938, a payment of $16,000 about a week before September 1, and a payment of $3,000 about a week after September 1. The payment of $12,000 (R. 401) Thomas fixes by a check in that amount (G-2) payable to cash, which Thomas himself cashed and which bears no notation of any kind whatsoever relative to petitioner. This $12,000 cash check of Thomas' was seized upon as fixing the dates of the alleged payments to petitioner. It must be noted here that the alleged three payments (R. 402) made within the period of two weeks and totalling $31,000 were made one year after the $31,000 check was received by Thomas from Younger as his commission on the 1937 truck sale, and several weeks before the receipt by Thomas of the $22,000 check received by him from Younger as his commission on the 1938 sale.

Thomas' statement (R. 401) that he paid the $31,000 "out of the $53,000" is proven to be absolutely false, since he did not receive his second commission of $22,000 until September 17, 1938, two weeks after he allegedly made the payments to petitioner. Moreover, Thomas, according to his own testimony, did not pay petitioner anything until nearly one year had elapsed, October 13, 1937,

to September 1, 1938, since he himself had received his first commission of $31,000 from Younger. The record shows (R. 966, Exhibit G-38) that Thomas' bank account in which he had deposited the $31,000 in 1937, was overdrawn on July 6, 1938, two months before any alleged payment to petitioner. Therefore, having spent the $31,000 he received in 1937 and having not yet received the $22,000 in 1938, his statement that he paid petitioner "out of the $53,000" is absolutely contradicted by the facts.

Thomas testified (R. 415) that the payments by him to petitioner were made in cash and that no one else was present at the time. Neither did he definitely fix any time of payment. The record shows (R. 402) that Thomas returned and paid income tax on both the $31,000 in 1937 and the $22,000 in 1938, and when confronted with this documentary evidence, what could he do but say it was done upon petitioner's instructions.

The $31,000 having been deposited by Thomas in his bank account and commingled (R. 456) with his other funds and spent by him before making any of the alleged payments to petitioner, he was again compelled to testify that he kept this sum "as a side issue", "more as a trust" for petitioner, and that "I treated it differently by keeping in the back of my mind that it was separate" (R. 495).

Thomas made a weak and unsupported attempt to show that the $53,000 was kept as a trust for petitioner, but the whole transaction, according to Thomas' own testimony, was mental, and he testified (R. 495) that he did not have any discussion with petitioner at the time the

last $3,000 was paid, and after he had paid the $12,000, relative to any balance remaining in the "trust". He said,

> "I don't recall any particular discussion of it. I can't recall any conversation on that subject."

And when asked,

> "At any of these three meetings with Leche at which you made the payments to him of the sixteen, twelve and three, did you at any time tell him how much money you had paid out of that amount, or how much you had left in that $53,000?"

he answered,

> "No, I don't think I did."

It certainly appears that the "trust" idea was dissolved by Thomas' own testimony. It is also significant that in December, 1939, long before the trial of this case (R. 908), Thomas repaid the entire $53,000 to the Louisiana Highway Commission.

When petitioner attempted (R. 417) to cross examine Thomas as to the alleged payment by Thomas to him of $31,000 government counsel objected and was sustained by the court (R. 417) on the ground that "it wouldn't make any difference if it was gotten from the state what he did with it". Thus petitioner was prevented from cross examining the only witness who testified that petitioner received any money and this cross examination related to that important matter itself. In the first place the question did not relate to "what petitioner did with it", the question propounded to Thomas (R. 417) was "what was the occasion for making these payments to him?" clearly a

legitimate and necessary question on cross examination of the sole witness who had testified on direct that he had given petitioner any money. Thomas was a government witness, and although admittedly a party to the alleged scheme, had been granted immunity. He could easily have answered " I gave him the money pursuant to the scheme to defraud", or "the money I gave him was his part of the deal". But government counsel objected and was sustained because "it wouldn't make any difference if it was gotten from the state what he did with it". Whether the money came from the state was clearly a question of fact to be found by the Jury. It was more than this, it was one of the most vital issues in the trial. The trial court not only usurped the functions of the Jury in finding this fact, but actually made it the basis of his ruling in sustaining the objection. Now if petitioner had been on the stand, had admitted receiving the money and then sought to justify his action by testifying what he did with it, an objection sustained because "if the money came from the state it wouldn't make any difference what he did with it", might have had some merit. But such was not the case. Petitioner (R. 613, 614) strenuously denied receiving any money and Thomas' unconfirmed and uncorroborated testimony is the sole testimony in the record to this effect. Petitioner was entitled to cross examine Thomas on this point whatever the grounds for objection might have been, but to sustain such an objection by assuming such a vital fact, clearly a matter for Jury determination, is unquestionably reversible error.

The record being barren of any testimony connecting petitioner with any scheme to defraud which might have

existed, Government counsel seek to convince this Court that petitioner must be guilty because of his participation in similar transactions. The transaction in question relates to petitioner's interest in a legitimate contract for the sale of gas. This was purely a business transaction (R. 665) totally unconnected with the State or the United States in any way except that the State collected its severance tax on gas that was otherwise being wasted. Petitioner (R. 653) was obligated to pay his pro-rata in securing leases and drilling wells. However, (R. 654) it developed that the syndicate was able to purchase gas which was being wasted, thus, transforming a public liability into a public asset and, therefore, the necessary investment in securing leases and drilling wells was obviated. There was nothing wrong or even unethical (R. 665) in this transaction. No political favors were granted or political pressure exerted (R. 665) in regard to this transaction, but, on the contrary, petitioner (R.666) sponsored legislation that cost the gas interests over half a million dollars per year in additional taxes. There is no similarity whatsoever between this transaction and the case at bar and if the Government's contention was correct the only evidence necessary to convict one of any crime would be his participation in a legitimate business transaction.

The testimony of the Government's principal witness, Thomas, (R. 411) that petitioner never discussed the terms of sale, that he knew nothing about truck prices, that he never discussed prices or terms of sale at any time and (R. 413-414) that petitioner did not know what price was going to be paid for the trucks in question, pierces the

vitals of the Government's contention and is, alone, sufficient proof of petitioner's innocence. It absolutely destroys any "intent" on the part of petitioner, a vital element in this crime.

Furthermore Thomas was not even indicted, while Younger and Abernathy were merely fined in the sums of $3,000 and $1,000, respectively. Even with the immunity given Thomas and the leniency shown Younger and Abernathy, the government not only failed to make out a case against petitioner, but the record shows affirmatively that petitioner was not a party to any fraudulent scheme.

For a fuller discussion of the facts, we respectfully refer the Court to Pages 1126-1144 of the Record, the other contentions of the government being fully answered in the petition for a writ of certiorari.

CONCLUSION.

Counsel respectfully submits that the petition herein presents such fundamental questions of law involving the constitutional rights of the petitioner, which are unanswerable by the Government, that petitioner is clearly entitled to a review of this important matter by this Court and it is respectfully prayed that the writ asked for be granted.

Respectfully submitted,

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